C O R R E C T E D V E R S I O N

LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 13 August 2008

Members

Mr C. Brooks
Mr R. Clark
Mr L. Donnellan
Mr M. Foley
Mrs J. Kronberg
Mr E. O'Donohue
Mr J. Scheffer

Chair: Mr J. Scheffer
Deputy Chair: Mr R. Clark

Staff

Executive Officer: Ms K. Riseley
Research Officer: Ms S. Brent

Witness

Professor T. Sourdin, professor of conflict resolution, University of Queensland.

The CHAIR — Tania Sourdin, thank you very much for coming to talk to us this afternoon.

Prof. SOURDIN — It is a pleasure.

The CHAIR — I think you understand, having been at these forums before, that our conversation is subject to parliamentary privilege. You understand what that means and also that Hansard staff will be recording proceedings, and you will be sent a copy of that material. We will hand over to you to talk to us for a while. We have got half an hour.

Prof. SOURDIN — It is half an hour. My apologies for that starting up. I did have a copy of the email that was sent to me, and I just wanted to make sure I brought it up on screen and attended to the various questions there. I was not sure whether there was something all that specific that you wanted me to go to other than the questions that you sent me in advance, which I thought were helpful. I suppose at the outset when you are looking at an inquiry into vexatious litigants there is always a question of the definitional issue, and no doubt the committee has been engaged with that for some time, about what is vexatious, what is unreasonable and the various subdefinitions within the category of vexatious litigant. I will not go into those definitional dilemmas, although noting that they are significant.

I thought it was probably appropriate to say a couple of things at the outset, because I think you are much more focused on court proceedings rather than what happens in a pre-court sort of situation, except to note that I suspect that a number of people who could be termed vexatious probably never even make it into the litigation system because they have their conflicts resolved through ADR before they get into the system. So I should give you some light at the end of the tunnel in that your ADR system is probably resolving some pretty nasty and toxic conflicts before they even get into the court system. Some of the people who are inevitably drawn into conflicts in that pre-litigation setting are people whose behaviour could be described as unreasonable or aberrant or toxic or difficult for a range of other reasons. I suspect that that probably is reducing the load within the legal system.

I think there is another issue, too, that is really about how serious the problem is within the legal system. There are not that many unrepresented litigants who are actually operating — to my understanding anyway — in the higher court system. VCAT and the Magistrates Court may be a different matter. I have just done a sample of files from the Supreme Court and the County Court for the first three months of this year as part of a study I am undertaking for the Department of Justice. Whilst there are unrepresented litigants within that study, really the numbers are smaller than what I had expected. In terms of case management events they are actually attending fewer case management events than the other categories of litigants, which I found very surprising. I would have thought that the self-represented litigants would be using the court system more frequently. That is not to say, however, that they might not be spending longer in the case management events than other litigants, but I just thought that that was interesting.

The CHAIR — Are you drawing a relationship there between self-represented litigants and potentially vexatious litigants?

Prof. SOURDIN — Often, because those within that category of vexatious litigants are often self-represented — although not always; often they will bring multiple representation. We did look at multiple representation as well and how frequently people changed representatives. It is, I suppose, a bit rarer, in my experience, to find one representative who will stick with a vexatious litigant — if you wanted to describe the behaviour as unreasonable — for a long period of time. It is difficult, I think, for representatives to deal with the host of behavioural and other problems that surface.

In terms of mediation and what do you mean by vexatious? — I hate to come back to definitions; I said I would not go there — there are a whole host of behaviours which, as you know, are troublesome for courts and for mediators and for anybody involved in ADR. There are those with borderline personality disorders; there are those who exhibit difficult behaviours and a whole host of symptoms that are difficult; there are those who are sometimes categorised as the HCPs — they are the high conflict people. You might not know that term yet. There is a visiting American who is coming out next month who you might be interested to meet if you are still engaged in this inquiry. His name is Bill Eddy; if you are interested I can put you in contact with him. He has written a book on HCPs, *High Conflict People in Legal Disputes*, from the states. He suggests that a number of people who do not have high conflict personalities or behaviours can sometimes become that way because of exposure to the litigation system, which I think is quite interesting.

I suppose a point I was trying to make at the beginning of that very long diatribe was really that there was a lower number of self-represented litigants than we expected when we looked at our research. One thing that was also a bit surprising was that despite there sometimes being referral orders out to mediation, none of them had actually gone out to mediation once they were within the court system.

Mr DONNELLAN — How many? Is it possible to give us a rough estimate of how many?

Prof. SOURDIN — I can look it up for you now, if you like.

Mr DONNELLAN — Yes, if that is all right.

Prof. SOURDIN — I will tell you in a minute.

Mr DONNELLAN — The second part of that is they do not go to mediation because they do not think they will get justice there. I am sorry; it is just out of interest. You probably have not had a chance to look at that yet.

Prof. SOURDIN — I am not sure why they have not gone to mediation. We did not have clear answers to that question.

Mr DONNELLAN — Fair enough.

Prof. SOURDIN — They may not have gone to mediation because they could not agree on the mediator with the other side, although of course in the Supreme Court they probably would have used a master or an associate judge under those circumstances. The other side may have been unwilling to engage in mediation, despite even the presence of a judicial referral order, or may have been unwilling to engage with them for other reasons. There are issues; they may have refused to pay for the cost of a private mediation. I would have thought that was quite likely. In the County Court if they refused to pay for a private mediator and they were not able to access a judge-led conference, which is only available in a couple of lists, they would not have had an ADR option available to them which did not involve them paying sums of money. They could potentially have gone to Dispute Settlement Centre Victoria, but really for them to access it I think would have been quite difficult. I think there probably is an issue about unrepresented litigants accessing ADR services, and also probably an issue about court staff's understanding and knowledge about ADR services for that contingent.

For the more high conflict group who may be represented, which is probably a bigger tranche, and who may change over representation, there may be issues with them going to mediation anyway because they are so frequently changing over their lawyers that it is actually quite difficult for lawyers to even unravel what the history has been. But then there may be behavioural and other issues which are problematic in a lot of standard mediation models. I think you need mediators with very high-level skills to deal with certain behaviours. If there are borderline personality disorders or a host of other behaviours, then you need quite skilled mediators, and I think there are probably some issues around barrister mediators querying whether or not they are best placed to deal with some of these litigants. I suspect not. You may need to have those who have skills in some of the softer, more people-skill areas to deal with the mediations. There are those issues.

The question of whether or not they can ever go to ADR was one of the questions. I have not brought up the questions on the screen. Yes; there is little now that does not go to mediation. It was not that successful with Mr Rajske, who was described as a vexatious litigant, but I suppose the reality with Mr Rajske, who I dealt with as a judicial officer in New South Wales, was that he had spent a lot of time in the litigation system and was very angry. You could probably describe him in a range of different ways. He did go to mediation. It did resolve the dispute, and he then tried to open up the settlement agreement afterwards, but the court pretty much said no, so there is some precedent dealing with him.

There was a court case in Western Australia dealing with a person who had an incapacity, and there are a number of people with incapacity who have gone through mediation processes. In *ACCC v. Lux* the decision of the court was: why should a person who is already disabled and has an incapacity be deprived of an ADR process and be forced into a litigation system? In fact there ought to be options around for these people, too.

But if there is no question that it is medication that they need and not mediation, then you cannot necessarily use mediation as a cure. Sometimes, however, a good entrance-based process can be useful, at least to help define what the issues in dispute are.

It is extremely difficult to mediate matters where you have got people who have significant behavioural and other issues. You have to look at changing process, and I think you need to have a very good understanding of potential process interventions. We are a little hampered in Victoria because we do not have very clear procedural guidelines for litigant obligations or for representative obligations, so litigants do not have to engage in a good-faith negotiation, nor do representatives. I know that that is something that the VLRC has commented on recently. I think that probably does help. When you have got this category of vexatious litigants you need to have something behind that so that the mediator has something that you can refer to about what the expectations are in relation to behaviour before you get into an ADR process.

The CHAIR — Tania, can I just stop you there?

Prof. SOURDIN — Yes; please do.

The CHAIR — We have had different witnesses today, and you are the last, and there has been a spread of debate. Some groups think that we are moving down the track of medicalising people, medicalising issues and labelling people, and that this is part of a social construction around personal disorders.

Prof. SOURDIN — HCP.

The CHAIR — I dare say that particular viewpoint would put Bill Eddy into that box. On the other hand there have been strong views put — and we have had Professor Mullen here and Grant Lester, who have talked to us previously — about how this is a personality type or a personality disorder or a manifestation of some sort, so there have been different accounts of this. You have talked about that a bit. How do you see that, and how useful are those kinds of descriptors when we come to thinking about law and thinking about how courts operate?

Prof. SOURDIN — I do not think they are all that useful at all. I much prefer the high conflict behavioural description. Bill Eddy says about 15 per cent of the population has either a borderline personality disorder, a personality disorder or something that is related. That is a pretty big chunk of the population you are talking about. He is American and maybe the incidence is somewhat different there — I do not know — but that is a pretty high statistic. His view is that you can put perfectly sane people into a litigation process and that those people who were previously quite sane as a result of the conflict will begin to develop behaviours, begin to develop obsessions and begin to do things that they might not have otherwise done. I think there is something to that. I think there is also sometimes a real lack of understanding from their perspective about what the outcomes are going to be, and they seriously do think that there will be a light cast over the other person, that the bottom will drop out of the court and that the judge will say, 'You are evil; you are bad'. Sometimes there is a very weird understanding about what the reality of a court process is like and what the real remedies might be. The long and short of it is that you can look at negotiation in a range of different ways. One of the ways you can look at it is by typing and talking about negotiation types and behaviours.

Another way is to look at it from a process perspective. I think you are better off just saying that conflict can make sane people act in a very weird and unusual way, that what you try to do is improve the system so that it gives them an out, that you try to do a reality test, that you try to put protocols around behaviour, but for those that are right in the extreme end, they are not picked up by the collaborative law. Collaborative law will filter out those categories too. They will not take them on in collaborative practice because it is a question about rational decision making — can this person make a rational decision? But if you look at the high end parts, then the question is: can you use an ADR process then? I think you still can but you need to adjust your ADR process; you probably need a co-mediation model. You need to take a lot of time. You need to assume that it is not going to go away in a 3-hour mediation session and you need to make sure that there are very clear guidelines, protocols, and public protections for the ADR practitioner too.

There are very few protections. There are really no secure facilities if you are conducting ADR. I would not want to conduct a mediation with some litigants unless it was very secure, probably not even have the other person in the room but look at a videoconferencing facility as you do in the family sector. In the family sector you get some very, very difficult behaviours and if you wanted to talk about that as a model, the Relationships Australia DVDs and the other work that has been done on high conflict people — because that is what their descriptor is as well — is, I

think, very interesting and probably useful for this committee. They do not suggest now automatically that you rule those people out of ADR processes. They suggest you can run ADR processes, but that it requires a lot more work, a lot more intake, a lot more preliminary conferencing and certainly no assumption that you will get rid of them in an afternoon.

I do not know if that helps.

Mr DONNELLAN — Really in a lot of the stories it is the front-end dealing with this which is the real issue in the sense of having more resources at the front end to act as a clearing house to manage these people early to get them in and out of the system.

Prof. SOURDIN — You have got people who are displaying competitive negotiation behaviour and they are not actually very good at competing. The strategies that they use are power-based strategies. They do not really understand a rights-based system and it is hard for them to get an interest-based system. You cannot prevent people from launching court action once they have got to a particular point. It is impossible to put in much filter beforehand. You try to do what you can, and you can look at pre-action protocols.

If you assume that they are in the court system, then the question is, what do you do with people once they are there? You know that the behaviours are likely to get worse the longer the matter continues on, so you therefore need to have staff that understands this and can do some intake work within courts. I think you need to have specially designed ADR processes that can deal with this group of litigants, because although my figures show that there are probably not that many of them — and that is an issue in itself — why are there not more? If you have got 15 per cent of the population with this whole group of symptoms, and if you have got other factors that are operating within the court system, you would actually expect to see a few more self-represented litigants than there were. I was a bit surprised at the figures. You would expect them to be accessing ADR.

The CHAIR — It is interesting — and I do not know if other members agree — because the sense we have been getting is that this is increasing, and you have come and said that the data is showing that it is not the case.

Prof. SOURDIN — I think it might be a bit late litigation. You might not actually get increases in litigation, but what you deal with is more complex and more cumbersome, and it might be a bit that way with vexatious litigant behaviour. You might not necessarily have that many more in terms of numbers of litigants, but what you might have is more time being consumed within the system by the ones that you actually have. Maybe there needs to be a better analysis of the problem. I do know Grant Lester's work, but really I do not think it is a very complete picture of what actually happens within court systems. I have read other bits and pieces from around the place, but I do not think it is actually all that useful. I think the problem for judicial officers is that you remember them. They are so difficult that they stick with you and you will remember that behaviour because it was so horrendous and difficult to deal with, no matter what you did and no matter how nice you tried to be to a person.

Mr FOLEY — It is so far out of your normal frame of reference of behaviour, and why can they not behave like that nice QC?

Prof. SOURDIN — Yes, and why do they not understand and why do they keep coming back with additional issues, or why do they keep going with this sort of behaviour? I keep trying to deal with them in a respectful, appropriate manner, but they keep coming back. I think they are thought about more even though their frequency may not necessarily be increasing; it is just that they might be consuming more time.

Mr DONNELLAN — Just to follow on from that, some of the other witnesses have said or intimated that self-represented litigants have become more adept at navigating the system because of the accessibility of information. Is that a proposition you would agree with?

Prof. SOURDIN — Not based on that sample I looked at earlier this year. I do not think they are necessarily more adept at it. I think that in what we looked at, the only people who are accessing the court system tend to be well educated, wealthy people and many of them are repeat players so there are some significant issues about who accesses the court system. You may get a tiny proportion of people who do not fit within that mould, but the bulk of people are not representative of all the demographics of Victoria.

On the one hand you would not expect them to be because you are going to have more of the business disputes than other disputes in the court system, so you are going to expect to see people with money arguing about money. If you do not have any money, you are not going to be arguing about it in probate or whatever else. But even when you take into account all of those who are injured, you still get a very strange demographic. It is still not representative and you would expect that with injuries you would actually have a demographic that was a bit different.

The CHAIR — Coming back to Bill Eddy's HCP group that you mentioned before — —

Prof. SOURDIN — He has written a book on HCPs.

The CHAIR — We will rush to it. There is something antithetical about that type, as I understand the way you have described it, and the whole reason for having ADR anyway. The legitimacy of ADR seems to be premised on the person who in the first instance thinks an issue can be resolved through conversation, looking at evidence and appreciating different points of view; and then you have a class of people that seem to have a personality type that is antithetical to that. Is that a reasonable way of characterising them?

Prof. SOURDIN — So the question is: can they make rational decisions given that there is a kangaroo loose in the top paddock? That is an expression I used recently overseas, and nobody understood what I meant. It took me a very long time to try to explain it. But the question is: can somebody who, because of a range of factors, make a rational decision? Can they be supported in some rational decision-making process? That is really the essence of the question.

I think there are so many different groups that you can classify as having high conflict behaviour. Most people who come into an ADR process tend to be pretty competitive and may be exhibiting behaviours that are not altogether that helpful in terms of resolving a conflict. Usually they cannot think very rationally about anything until they have actually talked quite a while and they have organised the information in a way that makes sense to them. I do not think this category should be ruled out of ADR processes automatically. I have certainly dealt with people with bipolar disorders, with Alzheimer's and with others as a mediator, and you have to significantly change your process and have supports around it. You have to make sure there is some way of accessing advice so that you can talk about how other people make decisions and about what sort of information they need. There is a point where I think you have to say, 'It is not going to work', to resolve their dispute. But we can ask: can it work at least to narrow the issues in dispute? And then I think you need to have quick referral back into the court system so that you can tie down what those issues are, and have a facility to make sure they can be tied down.

The CHAIR — What are providers saying about this?

Prof. SOURDIN — I think there are different views. I think for the DSCV and other groups, they deal with these kinds of behaviours on a regular basis. I think in the family sector they are dealt with on a regular basis. But I do not think in the world of legal mediation these sorts of behaviours are understood at all, and nor are they something that skills based learning or anything else is directed to in that sector. I do not think they are well understood. I think these sorts of people are seen as clients who are irrational and difficult, and therefore, 'Let's get them out of the room and go straight to a shuttle negotiation', which might not necessarily be the best approach, depending on the client.

The CHAIR — That would suggest there is a need for training.

Prof. SOURDIN — Not necessarily even for training, but there is definitely a need for intake, which, my research shows, no legal mediators seem to do in the higher courts at all. They do not do intake; they do not do any preliminary conference work. So they do not even know there is a problem until people get into the room. The stock standard approach for the legal mediators is pretty much to go to a shuttle negotiation if one surfaces. If you do not do intake you do not actually know that the best time to run a mediation is in the morning after the medication has kicked in and never in the afternoon. Little things like that make such a big difference. Courts cannot do that. They just schedule a matter. They do not actually think that this person will not be very good at getting themselves organised so you cannot put anything on before, say, 10.30 a.m., and in the afternoon they are likely to go off and it is going to be really hard because they might get sleepy or there might be other problems. You actually have to structure the process a bit around sometimes even the medication in the background, but we have to do it because it is a big percentage of the population. You cannot just say, 'You cannot have access to the court system', if it is an issue like that and it is not brought on from something else, and if there is medication.

The CHAIR — We have also heard that ineffective dispute resolution can contribute to vexatious behaviour. The argument is that if complainants feel they have not been given a fair go, they just keep on pursuing justice in the courts.

Prof. SOURDIN — Yes, I have read a lot about it. The work on the querulent behaviour of the complainants and the sorts of indicators is very interesting. I think they are the same indicators that you look for in the courts. You look for a lot of underlining; you look for spidery handwriting; you look at very dense pages. There is a whole range of little things which you can look for that carry on from one to the other. The question is: is their behaviour worsened by poor complaints handling? Probably, I would say.

Mr DONNELLAN — So they use more highlighters in the long run, and different colours.

Prof. SOURDIN — And a lot of pages. If you have ineffective complaints handling, yes, it probably does make it worse. But at the same time it is very hard to assess what level of effective complaints handling there is that actually prevents things from surfacing. I know there are some litigants who just bounce around the different schemes. They are pretty much flicked from one to the other. In one area they are told, 'Oh, no, we cannot deal with that here. You had better go somewhere else'. I think that bouncing happens a lot, so you see the same people. I query whether they are even increasing; they just might be the same people going from place to place to place and never actually getting any sort of adequate response. They may not know whom their grievance is against even sometimes, so there is no dispute counselling or anything else for that class.

Certainly the complaints handling providers do not do the dispute counselling work that is sometimes needed. Sometimes these people might need conflict coaching. They actually do not even know. There is such a lack of awareness that they do not even realise that if they went back to a situation they could look at what could have been done differently, and how they could deal with something differently into the future.

A lot of the complaints handling is pretty unsophisticated. It is designed for the large group of people rather than this group of people. It is interesting, because a number of people are interested in this in the complaints area. I know that because they are interested in what Bill Eddy is doing. I think people are taking more notice now than they were in the past. I think before it was just like, you just do not deal with them, or you go straight to an advisory or decisional process. I think there is now a bit more engagement and consideration of whether you can use more facilitative processes as well.

Mr DONNELLAN — I wonder if you have had a chance to look for the numbers of represented litigants.

Prof. SOURDIN — I have not, but I will. This report I have only just released in a first draft to our advisory group. It is a report that has been prepared for the Department of Justice on effectiveness of mediation in the Supreme and County courts. We looked at a three-month sample of finalised matters in January, February and March of this year and then surveyed participants in all the processes that we used about what their perceptions were like. I will actually go to the PowerPoint that I did the other night; that might be the easiest way. It is a very long PowerPoint, so it might just take me a minute.

Mr DONNELLAN — That is the department of justice of New South Wales, is it?

Prof. SOURDIN — No, Victoria. I am just flicking through the PowerPoint. There was some dissatisfaction with some of the mediation processes. In only 6 per cent of the cases that we analysed was there any intake process at all to mediation, which is actually a worry when you are looking at this category of litigants. These litigants in particular, if you are talking about it as a group, will be more suspicious of a shuttle negotiation process or any secret sort of conversation, so you need to be very clear on process and be very transparent, I think, as well.

Mr DONNELLAN — Because they will FOI the video of the shuttle negotiations next, if they could.

Prof. SOURDIN — Sorry?

Mr DONNELLAN — I am saying they would like to FOI the video of the shuttle negotiations to work out what the conspiracy was.

Prof. SOURDIN — There are issues with recording and things like that as well which happen in mediation. Sometimes you can in fact have public mediations. You can actually have a mediation that is

transparent, if everybody agrees. There is no reason why you cannot, other than you might be offending the court rules. But I do not think if everyone consents it is an issue.

I will just find it. They are very old cases in both courts — old in that people took quite a long time before they filed proceedings, which was interesting as well. Those disputes tend to be more intractable as well. I have not done an analysis of whether or not the unrepresented litigants were in the same group — that is, they took a while before they actually got into the court system. I am just trying to find it. Here we go — access; 58 per cent of those that we surveyed had been involved in a previous legal action. We were really shocked that the repeat player number was so high. Twenty-one per cent of disputes in the County Court involved self-represented litigants, and none of those cases were mediated — none of the ones we looked at; they went to trial.

I will send you these once the report is made public. In the Supreme Court, of the ones that were there — and I do not know if I have got the right field because I am looking at PowerPoint at the moment — in fact you did have some self-represented litigants going to mediation. Eighty per cent of the total number of self-represented litigants in the Supreme Court, which was much smaller than in the County Court, had their matters finalised at mediation. So you actually did have a small number that went to mediation. Some of them attempted negotiation and some of them had reached agreement with negotiation in the self-represented group. But really high numbers went to trial, and higher than you would expect.

Given that referral orders to ADR are pretty much mandatory in both jurisdictions, you would have expected that all of them would have either gone to negotiation, that they would have had a mediation process before they went to trial, but these people were not using mediation. That raised an issue for us as researchers about why they were not going to mediation, and we do not know why they did not go. I am sorry I cannot give you more information on it. It is only a very small part of what we were looking at. We were not really specifically looking at self-represented litigants. It is fair to say, too, that self-represented litigants are not necessarily vexatious, and I do not want to suggest that.

Mr DONNELLAN — They are not all HCPs — some of them are. I am joking; I am being cheeky now.

Prof. SOURDIN — But the family area would be very interesting for you to look at, with high violence, high conflict clients.

The CHAIR — We have had witnesses talk to us about that.

Prof. SOURDIN — Andrew Bickerdyke from Relationships Australia is probably a good person. That would be useful, because they have really changed what they have done. It was seen before that you really could not mediate a number of these matters, but now it is assumed that there are so many of them that you have got to mediate them.

The CHAIR — Thank you very much, Tania, for what has been a stimulating half-hour. You will get a copy of the transcript.

Prof. SOURDIN — I hope it is all right. It is not so much my area, although ADR is.

The CHAIR — It has been extremely valuable.

Prof. SOURDIN — If you want to find out about Bill Eddy, he is out here in September. He is going to the National Mediation Conference out at Perth.

The CHAIR — So are we.

Prof. SOURDIN — If you are going to the National Mediation Conference, you will see him. In fact he is running a one-day workshop on high conflict people before the conference starts.

The CHAIR — We cannot do that. We have got Parliament, so we are going on Thursday evening.

Mr FOLEY — Buy his book while you are at it.

Prof. SOURDIN — You can buy his book on Amazon.com. I think at billeddy.com — —

The CHAIR — That is a commercial we are not putting out.

Prof. SOURDIN — I think you can look on his website. He has got a number of publications. In fact there are a couple of papers that he has written. I think he is interesting, because it is a bit of a different slant to the querulent complainants slant. So few people around the world do any research in this area that it is kind of interesting to talk to him. He is presenting a keynote at the conference so you will get to see him there. He is worthwhile talking to, I think.

The CHAIR — Thanks again.

Prof. SOURDIN — That is okay. Good luck with your inquiry. I hope it all goes well.

The CHAIR — It will, I am sure.

Committee adjourned.